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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Constance Ann Maynard, Plaintiff, vs. CNA Group Life Assurance Company, et al., Defendants.	)	No. CIV 04-0525 PHX RCB O R D E R

On June 8, 2005, Defendants CNA Group Life Assurance Company ("CNA"), et al., filed a Motion for Summary Judgment in this matter.[1] Motion for Summ. Judg. (doc. 72). Plaintiff Constance Ann Maynard filed her response to this motion on August 22, 2005. Resp (doc. 77). Thereafter, on October 11, 2005, Defendants filed a motion to strike certain exhibits filed by Plaintiff. Mot. to

[1] On December 22, 2005, the parties in this matter filed a Stipulated Motion for Leave to Amend Complaint to Add Additional Party. Motion for Leave to Amend (doc. 105). This motion requests that Hartford Life Group Insurance Company ("Hartford") be added as a defendant in this case. Id. The Court shall grant this motion and deem this order to apply to all defendants in this matter, including Hartford.

Strike (doc. 92). Then, on October 17, 2005, Plaintiff filed a motion for leave to file the Supplemental Declaration of Constance Ann Maynard and the Declaration of Stuart H. Sandhaus. Mot. for Leave to File (doc. 95). In addition, Plaintiff filed a request for judicial notice. Request Jud. Not. (doc. 98). These motions were fully briefed on November 3, 2005, and Defendants' motion for summary judgement was argued orally on December 19, 2005. Reply to Mot. to Strike (doc. 103).

I. Background Facts

Plaintiff's claims arise under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Plaintiff has sued for long-term disability ("LTD") insurance benefits under an employee welfare benefit plan ("Hewitt Plan") provided by her employer, Hewitt Associates, L.L.C. The Hewitt Plan purchased LTD insurance coverage through Continental Casualty Company and CNA Group Life Assurance Company (collectively "CNA") under policy #SR83100971 ("Policy"). The Policy became effective February 1, 1997, but was amended on January 1, 2001, granting CNA discretionary authority to determine claims as of January 1, 2001 ("Policy-2"). DSOF (doc. 73) at Exbt. B.

Plaintiff worked for Hewitt Associates, L.L.C. as a Measurement Consultant. The primary function and components of her job were "[m]arketing of various surveys, including telemarketing and assisting in the coordination of marketing materials to clients." Exbt. C (doc. 73). Plaintiff's position required no heavy or manual labor, and she was expected to work with a computer, telephone, and a calculator. Id. She typically lifted or carried business materials weighing less than ten (10) pounds. Id.

On July 5, 2000, Plaintiff stopped working at Hewitt due to an alleged disability, and, thereafter, submitted a claim to CNA for LTD benefits. To demonstrate that an insured was disabled under Policy-2, evidence must indicate that the claimant was "continuously unable to perform the Material and Substantial Duties" of his or her regular occupation. Exbt. B (doc. 73) at 7. "Material and Substantial Duties" means "the necessary functions of [the insured's] Regular Occupation which cannot be reasonably omitted or altered." Id. at 16. "Regular Occupation" means "the occupation that [the insured is] performing for income or wages" on the date of the insured's disability. Id.

CNA reviewed Plaintiff's physical job requirements and the medical records provided by Plaintiff's healthcare providers dating back to June of 1999. CNA sent these documents to Dr. Eugene Truchelut, an independent physician, board certified in internal medicine. On or about April 24, 2001, Dr. Truchelut opined that Plaintiff's medical records did not indicate an inability to perform sedentary work activities. Exbt. E (doc. 30) at 5.

On June 7, 2001, CNA denied Plaintiff's claim for LTD insurance coverage. After CNA denied Plaintiff's claim for LTD benefits, she exercised her right to appeal CNA's decision and submitted additional documents to CNA. On or about January 18, 2002, the appeals committee made a determination that Plaintiff was not disabled under the plan and affirmed CNA's earlier decision. Plaintiff, thereafter, filed this lawsuit. Complaint (doc. 1).

III. Defendants' Motion to Strike

Defendants ask the Court to strike numerous documents filed by Plaintiff in support of her opposition to Defendants' motion for

summary judgment. Mot. to Strike (doc. 92). Specifically, Defendants move to strike (1) the Declaration of Constance Ann Maynard ("Maynard Declaration"); (2) Exhibit A to the Maynard Declaration; (3) Exhibits A, M, O, P, Q, R, S, T, U to the Declaration of Stuart H. Sandhaus ("Sandhaus Declaration"); (4) the Declaration of Daniel L. Peterson, M.D. ("Peterson Declaration"); (5) Exhibits A, B and G to the Peterson Declaration; (6) the Declaration of Sheila P. Bastien, Ph.D. ("Bastien Declaration"); (7) Exhibits D, E, G and H to the Bastien Declaration; and (8) Plaintiff's Controverting Statement of Facts in Opposition to Defendants' Motion for Summary Judgment, ¶¶ 7, 40-50. Id. at 1-2. Defendants assert that all of these documents were produced after, or are based upon documents produced after, CNA denied Plaintiff's ERISA appeal, thus, they are not part of the administrative record. Id. at 2. For this reason, Defendants request that the documents be stricken. Id. at 2-3.

In contrast, Plaintiff argues that the contested documents should not be stricken, because they are either part of the administrative record or based upon documents that are part of the administrative record. Resp. to Mot. to Strike (doc. 97) at 3-5. First, Plaintiff's argument centers around evidence that was submitted to Defendants after January 18, 2002, when the appeals committee made its determination and affirmed CNA's earlier decision to deny Plaintiff's claim for LTD benefits. Id. at 3.

> "After Defendant CNA, who acted as the claims administrator, denied Plaintiff's benefits on January 18, 2002, Plaintiff filed an appeal with the Plan Administrator/Fiduciary, Defendant Hewitt. Both Defendant CNA and Hewitt thereafter accepted, reviewed, and considered additional evidence in support of Plaintiff's claim for LTD

benefits."

Id. Apparently, Plaintiff believes that she filed and Defendants reviewed a "second" appeal of her claim that occurred after January 18, 2002. However, Plaintiff herself notes that CNA, in its letter of January 14, 2003, in response to Plaintiff's submission of additional evidence after January 18, 2002, stated "[t]here are no further appeal reviews available." Id. at 4. In addition, Plaintiff points out that Defendant Hewitt, in its response letter, stated, "Ms. Maynard has exhausted all of her administrative remedies...[and] [s]he may now pursue any available remedies in court should she decide to do so." Id. The Court notes that Defendant Hewitt in this letter also stated "CNA provided you with a five-page final determination of benefits in which CNA advised that Ms. Maynard's administrative record was closed and the decision was final and binding." Sandhaus Declaration (doc. 81) at Exbt. U.

Second, Plaintiff asserts that the documents should not be stricken, because they are "based upon documents that are part of the administrative record[.]" Resp. to Mot. to Strike (doc. 97) at 4. In support of this assertion, Plaintiff again argues that Defendants reviewed the contested documents during the alleged "second" appeal. Id. at 5. Plaintiff admits that the contested information was "reviewed" by Defendants after the January 18, 2002 appeal decision. Id. ("The 'information' reviewed by Defendant CNA included updated medical reports from treating and consulting medical providers and rebuttal reports in response to documentation that was provided to Plaintiff as enclosures with Defendant CNA's letter of February 28, 2002."). However, Plaintiff argues that by

merely stating that they "reviewed" Plaintiff's correspondence or by referencing the additional materials in their response letters, Defendants automatically made the additional evidence part of the administrative record. Id. at 4-5. Plaintiff cites no authority to support this assertion. Moreover, Plaintiff fails to show that any of the contested evidence was considered by the plan administrator in its initial denial of Plaintiff's LTD benefits or in its review of her appeal.

In abuse of discretion cases, evidence outside the administrative record is completely inadmissible. Newman v. Standard Insurance Company, 997 F.Supp. 1276, 1280 (C.D. Cal. 1998). "Permitting a district court to examine evidence outside the administrative record would open the door to the anomalous conclusion that a plan administrator abused its discretion by failing to consider evidence not before it." Taft v. The Equitable Life Assurance Society, et. al, 9 F.3d 1469, 1472 (9th Cir. 1993). The documents filed by Plaintiff and challenged by Defendants in their motion to strike are not part of the administrative record. Thus, the Court shall grant Defendants' motion and order the documents stricken from the record.

IV. Plaintiff's Motion for Leave to File and Request for Judicial Notice

Plaintiff moves the Court for leave to file the Supplemental Declaration of Constance Ann Maynard and the Declaration of Stuart H. Sandhaus. Mot. for Leave to File (doc. 95). In explaining her reasoning for this request, Plaintiff notes that she has recently suffered from ill-health and, "[u]ntil recently, [she] was simply unable to assist counsel in preparing her more complete Declaration

in Support of the Opposition to Defendants' Motion for Summary Judgment." Id. at 3. Plaintiff argues that this equals "excusable neglect," and, under Federal Rule of Civil Procedure 6(b)(2), the Court may allow the late submission of her complete declaration. Id. In addition, Plaintiff requests that the Court take judicial notice of certain settlement agreements involving Departments of Insurance of forty-eight (48) states and UnumProvident. Request Jud. Not. (doc. 98) at 1. Defendants ask the Court to deny Plaintiff's motion due to the fact that the affidavits Plaintiff seeks to introduce are not part of the administrative record. Resp. to Mot. for Leave to File (doc. 100).

As noted above, in abuse of discretion cases, evidence outside the administrative record is completely inadmissible. See Newman, 997 F.Supp. at 1280; Taft, 9 F.3d at 1472. Plaintiff, in her motion, clearly states that the affidavits she seeks to file with the Court are new. Mot. for Leave to File (doc. 95) at 3 ("Over the course of the past several weeks, Plaintiff has been able to confer with counsel and prepare a more comprehensive declaration, which she hereby seeks leave to file."). Thus, such documents are not part of the administrative record and are inadmissible in this matter. The Court shall deny Plaintiff's motion. For the same reason, the Court shall also deny Plaintiff's request for judicial notice.

V. Defendants' Motion for Summary Judgment

a. Summary Judgment Standard

To grant summary judgment, the Court must determine that the record before it contains "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as

a matter of law." Fed.R.Civ.P. 56(c). In determining whether to grant summary judgment, the Court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. See Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. Id.

A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987).

b. Standard of Review

Typically, the standard of review to be applied by district courts in reviewing challenged denials of ERISA benefits is "a de novo standard[.]" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). However, when an ERISA administrator or fiduciary is given discretionary authority to determine eligibility for

benefits or to construe plan terms, the proper review of a denial of benefits is under an abuse of discretion standard. See id.; Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employees of Transferred GE Operations, 244 F.3d 1109, 1112 (9th Cir. 2001).

In its Order of March 29, 2005, the Court concluded that, as a matter of law, Policy-2 is the controlling document in this case. Order (doc. 60). The parties did not dispute that the language included in Policy-2 conferred discretionary authority upon CNA.[2] Accordingly, the Court determined that the appropriate standard of review in this matter is the abuse of discretion standard. Id. at 12.

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[2] During oral argument, Plaintiff for the first time argued that Policy-2 does not contain a provision granting Defendant Hewitt the right to delegate its "fiduciary responsibilities" to Defendant CNA. Oral Argument, December 19, 2005 at 11:23:56AM-11:25:01AM. Citing Winterstein v. Stryker Corporation Group Life Insurance Plan, 2005 WL 3149742 (9th Cir. 2005), Plaintiff asserted that this lack of contract language requires that Defendants' denial of Plaintiff's benefits be subject to a de novo review. Oral Argument, December 19, 2005 at 11:24:29AM-11:25:01AM. The Court, however, finds Plaintiff's argument and reliance on Winterstein to be misplaced.

First, the Court notes that Winterstein is an unpublished case and, consequently, not binding precedent in this Circuit. Ninth Circuit Rule 36-3. Second, the court in Winterstein stated that "CNA's benefits decision must be reviewed de novo unless the Corporation's discretionary authority was properly delegated to CNA." 2005 WL 3149742 at *1. This rule is no different from that defined previously in this order or in the case law cited in support of such definition. Although the court in Winterstein went on to find that discretionary authority had not been properly delegated to CNA, such a holding is not clearly relevant to this case. Id. To the extent that Plaintiff seems to be arguing that this Court should reach the same conclusion because CNA was involved in both Winterstein and this case, the Court notes that there is no evidence in the record that establishes any similarity between the contracts involved in Winterstein and the case at bar. Accordingly, the Court finds that the holding in Winterstein raises no new issues in this matter.

The Ninth Circuit has held that ERISA plan administrators "abuse their discretion if they render decisions without any explanation, or construe provisions of the plan in a way that conflicts with the plain language of the plan." Taft, 9 F.3d at 1472 (citing Eley v. Boeing Co., 945 F.2d 276, 279 (9th Cir. 1991) and Johnson v. Trustees of W. Conference of Teamsters Pension Trust Fund, 879 F.2d 651, 654 (9th Cir. 1989). In addition, "an administrator also abuses its discretion if it relies on clearly erroneous findings of fact in making benefit determinations." Taft, 9 F.3d at 1473; see Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 482 (9th Cir. 1990).

c. Analysis

1. Explanation of Denial of Benefits

Courts have held that ERISA plan administrators "abuse their discretion if they render decisions without any explanation[.]" Taft, 9 F.3d at 1472. Here, it is not clear whether Plaintiff alleges that Defendants abused their discretion by rendering a decision denying her LTD benefits without any explanation. Although Plaintiff, in her Response to Defendants' motion for summary judgment, enumerates this allegation in a heading, she does not contest the existence of an explanation, but ultimately argues that Defendants' decision was erroneous. Resp. (doc. 77) at 7 ("Defendants provide *no* explanation or medical evidence as to why it is discrediting the overwhelming medical evidence and opinions of Ms. Maynard's treating and consulting medical providers that she is disabled and is continuously unable to perform each of the material duties of her regular occupation."). Plaintiff fails to raise any specific argument alleging the complete absence of an

explanation. In fact, Plaintiff received a five-page explanation of the plan administrator's decision. Thus, the Court concludes that there exists no genuine issue as to any material fact in relation to this issue.

2. Plain Language of the Plan

Courts have also held that ERISA plan administrators abuse their discretion if they "construe provisions of the plan in a way that conflicts with the plain language of the plan." Taft, 9 F.3d at 1472. Again, it is not clear to the Court whether Plaintiff intends to allege that Defendants abused their discretion in this manner.

In her Response, Plaintiff lists this allegation in a heading, however she does not specifically argue how Defendants' decision conflicted with the plain language of the plan. Resp. (doc. 77) at 9. Plaintiff instead asserts that Defendants breached their fiduciary duties when they "secreted the alleged Policy-2 from the beneficiary until after the administrative record was closed and subsequent to the commencement of this litigation, knowing that Plaintiff would not be able to perfect her claim under a policy that contained material changes[.]" Id. at 10. The only specific material changes that Plaintiff notes are "the terms for establishing disability and the changing of the standard of judicial review from de novo to abuse of discretion." Id. Plaintiff does not, however, point to any evidence that indicates that Defendants' denial of benefits conflicted with the plain language of either plan. Regardless, the Court, in its Order of March 29, 2005, (doc. 60), concluded that Policy-2 is the controlling policy in this matter, and Plaintiff has not shown the existence of any

genuine issue as to any material fact in relation to whether Defendants' decision was in conflict with the plain language of Policy-2.

3. Clearly Erroneous Findings of Fact

Lastly, an administrator may be found to have abused its discretion if it relies on clearly erroneous findings of fact in making benefit determinations. See Taft, 9 F.3d at 1473; see also Jones, 906 F.2d at 482. A fiduciary's decision will not be overturned where "there is substantial evidence to support the decision, that is, where there is 'relevant evidence [that] reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.'" Snow v. Standard Ins. Co., 87 F.3d 327, 332 (9th Cir. 1996) (quoting Maynard v. City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994). "Abuse of discretion" means the entire record leads to the firm conviction that a mistake has been made by the plan administrator. See Boyd v. Bert Bell/Pete Rozell NFL Players Retirement Plan, 410 F.3d 1173, 1179 (9th Cir. 2005). However, "even decisions directly contrary to evidence in the record do not necessarily amount to an abuse of discretion." Taft, 9 F.3d at 1473-74.

Here, Plaintiff argues that Defendants' decision to deny her benefits was clearly erroneous because she provided substantial evidence indicating that she is disabled from Chronic Fatigue Syndrome ("CFS"). Resp. (doc. 77) at 4.[3] "The administrative record

[3] Plaintiff also raises an argument that Defendants breached their fiduciary duties to Plaintiff, thus making their decision an abuse of discretion. Resp. (doc. 77) at 9, 10. However, beyond a mere

contains a plethora of evidence establishing that Plaintiff is disabled from CFS. (SOF ¶¶ 12, 13, 15, 21)." Id. Plaintiff argues that her "treating and consulting healthcare providers were unanimous in their findings that Plaintiff was severely disabled by debilitating Chronic Fatigue Syndrome." Id. at 11-12.[4] Moreover, Plaintiff notes that she "received the maximum amount of Short Term Disability benefits from Defendant Hewitt, and was approved for benefits by the Social Security Administration." Id. at 12. Plaintiff asserts that once she submitted sufficient evidence to support her claim, it became Defendants' burden to produce "sufficient substantial evidence to establish that the CFS diagnosis was erroneous...and that Plaintiff was not disabled from CFS." Id. at 5. Although Plaintiff does not cite any authority that supports her burden-shifting argument, she contends that Defendants failed to fulfill this burden. Id. "Without affirmative evidence that Plaintiff was not disabled by CFS, it can only be concluded that Defendants [sic] denial of benefits was erroneous." Id.

In addition, Plaintiff argues that the review of her medical record was biased and incomplete. Resp. (doc. 77) at 11. Specifically, Plaintiff notes that Dr. Truchelut (1) never examined Plaintiff; (2) never contacted Plaintiff's treating and consulting healthcare providers to discuss her "complex and debilitating illnesses"; (3) never requested that Plaintiff submit to an

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statement of this assertion, Plaintiff fails to argue or cite any authority that supports this claim.

[4] Although it is not specified in her Response, Plaintiff seems to designate Daniel L. Peterson, M.D. and Sheila P. Bastien, Ph.D. as her "treating and consulting healthcare providers."

Independent Medical Examination; (4) and there was no peer review conducted on any of the submitted medical documentation and reports. Id. Plaintiff also argues that Dr. Truchelut failed to review and consider certain medical reports prepared by Dr. Peterson and Dr. Bastien. Oral Argument, December 19, 2005 at 11:27:59AM-11:30:59AM.

In support of her arguments, Plaintiff mainly relies on the decision in Camerer v. Continental Casualty Co., 76 Fed. Appx. 837 (9th Cir. 2003). The Court notes that Camerer is an unpublished case and, therefore, is not binding precedent in this Circuit. Id. at 839.[5] In any event, Plaintiff's reliance on Camerer is misplaced.

In Camerer, a former employee sued his employer's group plan administrator following the denial of disability benefits under an ERISA-governed welfare benefits plan. Id. The court affirmed the District Court's award of disability benefits to the plaintiff, finding that the plan administrator had abused its discretion. Id. The court in Camerer did not determine the standard of review that should have been applied, but instead stated that the plan administrator abused its discretion under any standard. Id. Camerer's occupation involved the manipulation of heavy steel beams surrounded by fast moving blades, and his medical records showed that he suffered the effects of a traumatic brain injury, causing him to have impaired visual-motor coordination, impaired memory,

[5] "Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel." Ninth Circuit Rule 36-3.

and difficulties with attention and retaining newly-acquired information. Id. Pointing out that the plan administrator's denial letters failed to acknowledge any of these neurological impairments and misunderstood critical facts in relation to Camerer's claim, the court determined that the plan administrator abused its discretion. Id. at 840. Such an extreme case is not on par with the matter that stands before this Court.

In the instant case, Plaintiff does not dispute that the medical records submitted to Defendants include inconsistencies regarding the status of her alleged disability and diagnosis. Resp. (doc. 77) at 3-4. Plaintiff only challenges the weight Defendants placed on such inconsistencies in making their final decision. Defendants, however, were not required to give deference to Plaintiff's treating physician's opinion or provide specific reasons for rejecting his opinion. See Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003). Moreover, the decision is not automatically deemed arbitrary and capricious because Defendants did not consider or find dispositive the fact that Plaintiff was approved for benefits by the Social Security Administration. See Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1285 (9th Cir. 1990). Finally, Plaintiff fails to cite, nor can the Court find, any authority indicating that Defendants were required to examine Plaintiff in person, contact Plaintiff's treating and consulting healthcare providers to discuss her "complex and debilitating illnesses," request that Plaintiff submit to an Independent Medical Examination, or have a peer review conducted on the submitted medical documentation and reports.

In making its initial decision denying Plaintiff's claim for LTD benefits, Defendant CNA considered the report and analysis of Dr. Truchelut. Exbt. D (doc. 73). In his report, Dr. Truchelut notes Dr. Peterson's diagnoses of CFS and other ailments. Id. at 5. In addition, Dr. Truchelut lists Dr. Peterson's conclusions that Plaintiff was incapable of sustained lifting, standing or walking for more than two hours per day, and that, due to cognitive dysfunction, Plaintiff had difficulty with concentration and completion of tasks. Id. However, despite these opinions, Dr. Truchelut found that Plaintiff's medical record did not support a finding that Plaintiff was unable to perform sedentary work activities. Id.

In support of this conclusion, Dr. Truchelut specifically points out that at the time Plaintiff stopped working, her "physical examination was fairly benign, and laboratory studies prior to that were generally negative." Id. The report itself includes numerous references to Plaintiff's medical record where the evident status of her medical conditions conflict. Exbt. E (doc. 73). Dr. Truchelut cites on at least twenty-eight occasions in his report that Plaintiff's exams or test results were "within normal limits", "negative", "described as normal", "unremarkable", or "benign". Id. Finally, Dr. Truchelut notes that although Plaintiff's record showed that she had a poor tolerance to vigorous exercise, "it is generally accepted that sustained sedentary activity typically requires less that 5 mets, and [Plaintiff] went well beyond that." Id.

A similar analysis was conducted on Plaintiff's appeal. After Plaintiff appealed CNA's initial denial of benefits, she submitted

additional information regarding her claim. Exbt. F (doc. 73) at 1. In its letter affirming the original decision in this matter, CNA notes that it reviewed and considered all the information, "as well as the psychological information presented by Dr. Bastien, but the evidence does not support a functional loss or significant deterioration that would preclude Ms. Maynard from continuously performing the substantial and material duties of her regular occupation[.]" Id. at 2. Again, CNA cites numerous inconsistencies in Plaintiff's medical record, noting that most of her clinical tests showed "benign", "negative", or "normal" results. Id. 2-3. CNA acknowledges the abnormalities noted by Dr. Bastien in the neuropsychological testing, but states that "this alone does not substantiate Ms. Maynard's inability to continue working." Id. at 4. "The psychological testing and information presented does not support a mental or emotional impairment that would preclude Ms. Maynard from working." Id. at 4-5.

Although Plaintiff asserts that Defendants failed to consider certain medical "reports" produced by Dr. Peterson and Dr. Bastien, she has not specifically indicated which "reports" she claims were not reviewed and whether or not they are even part of the administrative record. It is evident in Dr. Truchelut's report that he reviewed and considered medical records produced by Dr. Peterson. Exbt. D (doc. 73) (citing Dr. Peterson's notes and findings in Plaintiff's medical records). Although, in his report, Dr. Truchelut refers to medical "records" produced by Dr. Peterson instead of "reports", it is not clear to this Court that Dr. Truchelut was not referring to the same materials that Plaintiff claims Defendants failed to review. Moreover, Plaintiff has not

shown that any reports produced by Dr. Bastien were submitted by Plaintiff prior to Dr. Truchelut's review. Regardless, it is clear from Defendants' letter denying Plaintiff's appeal that Dr. Bastien's report was reviewed in reference to Plaintiff's appeal. Exbt. F (doc. 73) (citing Dr. Bastien's notes and findings in Plaintiff's medical records).

It is evident in the letters and reports described above that CNA considered the evidence before it in making its decision to deny Plaintiff's claim for LTD benefits. Plaintiff argues that Defendants' disregard of her treating and consulting physicians' opinions qualifies as an abuse of discretion. However, beyond the conclusive statements of her doctors, Plaintiff does not specify any clinical evidence in the record that clearly supports such findings. More importantly, Plaintiff fails to raise any argument that indicates that CNA based its decision on clearly erroneous findings of fact. Thus, the Court finds no genuine issue as to any material fact in existence in relation to this matter and concludes that Defendants did not abuse their discretion. Defendants are entitled to judgment as a matter of law.

Therefore,

IT IS ORDERED that the parties' Stipulated Motion for Leave to Amend Complaint to Add Additional Party (doc. 105) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike (doc. 92) is GRANTED. The following shall be stricken from the record: (1) the Declaration of Constance Ann Maynard (doc. 80); (2) Exhibit A to the Maynard Declaration (doc. 80); (3) Exhibits A, M, O, P, Q, R, S, T, U to the Declaration of Stuart H. Sandhaus (doc. 81); (4) the Declaration of Daniel L. Peterson, M.D. (doc. 82); (5) Exhibits

A, B and G to the Peterson Declaration (doc. 82); (6) the Declaration of Sheila P. Bastien, Ph.D. (doc. 83); (7) Exhibits D, E, G and H to the Bastien Declaration (doc. 83); and (8) Plaintiff's Controverting Statement of Facts in Opposition to Defendants' Motion for Summary Judgment, ¶¶ 7, 40-50 (doc. 78).

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Supplemental Declaration of Plaintiff and Declaration of Stuart H. Sandhaus in Support of Opposition to Defendant's [sic] Motion for Summary Judgement (doc. 95) and Request for Judicial Notice (doc. 98) are DENIED.

IT IS FINALLY ORDERED that Defendants' Motion for Summary Judgment (doc. 72) is GRANTED. The clerk shall enter judgment and terminate this case.

DATED this 10th day of January, 2006.

Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record